ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2011

Ms. Jeri Yenne
Criminal District Attorney
Brazoria County
111 East Locust, Suite 408A
Angelton, Texas 77515

OR2011-04082

Dear Ms. Yenne:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412097.

The Brazoria County Juvenile Probation Department (the "department") received a request for the clinical and medical records pertaining to a named individual at a specified facility during a specified time period and the entire detention record of the named individual for a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor, Disability Rights Texas ("DRT"). *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 58.007(c) of the Family Code, which reads, in relevant part, as follows:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise,

> concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
>
> (1) if maintained on paper or microfilm, kept separate from adult files and records;
>
> (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
>
> (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c); *see id.* § 51.03(a)–(b) (defining "delinquent conduct" and "conduct indicating need for supervision" for purposes of title 3 of Family Code). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See id.* § 51.02(2) (defining "child" for purposes of title 3 of Family Code). Upon review, we find the submitted information consists of law enforcement records involving a juvenile suspect; therefore, the submitted information is subject to section 58.007(c). You do not inform us, and it does not appear, any of the exceptions in section 58.007 apply to the submitted information. Therefore, this information is confidential under section 58.007(c) of the Family Code and the department must generally withhold it under section 552.101 of the Government Code.

However, we note the requestor is a representative of DRT, which has been designated as the state's protection and advocacy system ("P&A system") for purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act ("DDA Act"), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act ("PAIR Act"), 29 U.S.C. § 794e. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 C.F.R. §§ 51.2 (defining "designated official" and requiring official to designate agency to be accountable for funds of P&A agency), 51.22 (requiring P&A agency to have a governing authority responsible for control).

The PAIMI provides, in relevant part, that DRT, as the state's P&A system, shall

> (1) have the authority to–

> (A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]

42 U.S.C. § 10805(a)(1)(A). Further, the PAIMI provides DRT shall

> (4) . . . have access to all records of–
>
> . . .
>
> (B) any individual (including an individual who has died or whose whereabouts are unknown)–
>
> > (i) who by reason of the mental or physical condition of such individual is unable to authorize the [P&A system] to have such access;
> >
> > (ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and
> >
> > (iii) with respect to whom a complaint has been received by the [P&A system] or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect[.]

Id. § 10805(a)(4)(B)(i)-(iii). The term "records" as used in the above-quoted provision

> includes reports prepared by any staff of a facility rendering care and treatment [to the individual] or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

Id. § 10806(b)(3)(A). Further, PAIMI defines the term "facilities" and states the term "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons. 42 U.S.C. § 10802(3). We find the juvenile detention center is a facility. The DDA Act provides, in relevant part, that a P&A system shall

> (B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;
>
> . . .
>
> (I) have access to all records of –
>
> > (ii) any individual with a developmental disability, in a situation in which--
> >
> > > (I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;
> > >
> > > (II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and
> > >
> > > (III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect[.]

42 U.S.C. § 15043(a)(2)(B), (I)(ii). The DDA Act states the term "record" includes

> (1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;
>
> (2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and
>
> (3) a discharge planning record.

Id. § 15043(c). The requestor states the deceased individual suffered from mental illness and a developmental disability and that DRT received information reflecting that this individual died while he was in a residential facility. DRT explains it intends to investigate this death for possible incidents of abuse or neglect of an individual with developmental disability as defined by federal law. *See* 42 USC § 15002(8) (defining term "developmental disability");

see also id. § 10805(a)(4). DRT asserts the individual at issue does not have a legal guardian, conservator, or other legal representative acting on his behalf with regard to the investigation of possible abuse and neglect and his death. Additionally, DRT states it has probable cause to believe the individual's death may have been the result of abuse and neglect. *See* 42 C.F.R. § 51.2 (stating that the probable cause decision under PAIMI may be based on reasonable inference drawn from one's experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect).

We note a state statute is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp. 381, 382 (E.D. Tex.1995). Further, federal regulations provide state law must not diminish the required authority of a P&A system. *See* 45 C.F.R. § 1386.21(f); *see also Iowa Protection and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001); *Iowa Prot. & Advocacy Servs., Inc. v. Gerard*, 274 F. Supp. 2d 1063 (N.D. Iowa 2003) (broad right of access under section 15043 of title 42 of the United States Code applies despite existence of any state or local laws or regulations which attempt to restrict access; although state law may expand authority of P&A system, state law cannot diminish authority set forth in federal statutes); *cf.* 42 U.S.C. § 10806(b)(2)(C). Similarly, Texas law states, "[n]otwithstanding other state law, [a P&A system] . . . is entitled to access to records relating to persons with mental illness to the extent authorized by federal law." Health & Safety Code § 615.002(a). Thus, PAIMI and the DDA grant DRT access to "records" and to the extent state law provides for the confidentiality of "records" requested by DRT, its federal right of access under PAIMI preempts state law. *See* 42 C.F.R. § 51.41(c); *see also Equal Employment Opportunity Comm'n*, 905 F. Supp. at 382. Accordingly, we must address whether the submitted information constitutes "records" of an individual with a disability as defined by the DDA and mental illness as defined by PAIMI.

DRT contends the information listed in sections 10806(b)(3)(A) and 15043(c) was not meant to be an exhaustive list.[1] The requestor contends it was Congress's intent to grant a P&A system access to any and all information, including the particular information at issue here, the P&A system deems necessary to conduct an investigation. We disagree. By these statutes' plain language, access is limited to "records." *See In re M&S Grading, Inc.*, 457 F.3d 898, 901 (8th Cir. 2000) (analysis of a statute must begin with the plain language). Although the two definitions of "records" are not limited to the information specifically enumerated in those clauses, we do not believe that Congress intended for the definitions to be so expansive as to grant a P&A system access to any information it deems necessary. Such a reading of the statutes would render sections 10806(b)(3)(A) and 15043(c) insignificant. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute should be construed in a way that no clause, sentence, or word shall be superfluous, void, or insignificant).

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[1]Use of the term "includes" in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code indicates the definitions of "records" are not limited to the information specifically listed in those sections. *See St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); *see also* 42 C.F.R. § 51.41.

Furthermore, in light of Congress's evident preference for limiting the scope of access, we are unwilling to assume that Congress meant more than it said in enacting the PAIMI Act and the DDA Act. *See Kofa v. INS,* 60 F.3d 1084 (4th Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); *see generally Coast Alliance v. Babbitt,* 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress's plain language in statute, agency cannot carry out Congress's intent, remedy is not to distort or ignore Congress's words, but rather to ask Congress to address problem).

We note Exhibit B consists of reports prepared by staff of a facility rendering care or treatment. Thus, in this instance, even though the department claims these documents are excepted from disclosure under sections 552.101, 552.103, and 552.108, these claims are preempted by the PAIMI and the DDA. Accordingly, based on DRT's representations, we determine DRT has a right of access to Exhibit B pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 the United States Code and section 15043 of title 42 the United States Code. Thus, notwithstanding confidentiality under section 58.007 of the Family Code, the department must release Exhibit B to this requestor.

The remaining information, Exhibit C, consists of department booking and jail log information. In this instance, the remaining information is related to criminal law enforcement and is being utilized for law enforcement purposes. Upon review, we conclude DRT has failed to demonstrate the applicability of section 10806 of title 42 of the United States Code or section 15043 of title 42 of the United States Code to this information. Accordingly, DRT does not have a right of access to Exhibit C and it must be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

In summary, the department must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The department must release Exhibit B to this requestor pursuant to PAIMI and the DDA.[2]

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

[2]Because DRT has a federal statutory right of access to some of the information being released in this instance, the department must again seek a decision from this office if it receives a request for this same information from a different requestor.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 412097

Enc. Submitted documents

c: Requestor
(w/o enclosures)